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No. 678

In the Supreme Court of the United States

OCTOBER TERM, 1930

SMOOT SAND & GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Specification of errors	5
Summary of argument	5
Argument	8
I. By the original grant to Lord Baltimore the boundary between Maryland and Virginia was fixed at high water mark on the south shore of the Potomac River	9
II. Neither the Virginia constitution of 1776 nor the Compact of 1785 between Maryland and Virginia affected the location of the boundary line	13
III. The decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577, does not support the decision of the court below	22
Conclusion	30
Appendix (Charter granted June 20, 1632, by Charles I to Lord Baltimore, and Compact of 1785 between Maryland and Virginia)	31

CITATIONS

Cases:	
Alabama v. *Georgia*, 23 How. 505	12
Alexandria Canal Railroad & Bridge Co. v. *District of Columbia*, 1 Mackey 217	27
Atwater v. *Bodfish*, 11 Gray (Mass.) 150	20
Coleman's Appeal, 62 Pa. 252	20
Evans v. *United States*, 31 App. D. C. 544	20, 27
Fetters v. *Humphreys*, 19 N. J. Eq. 471	21
Georgetown v. *Alexandria Canal Co.*, 12 Pet. 91	20
Herald v. *United States*, 284 Fed. 927	17, 20, 27, 28
Marine Railway Co. v. *United States*, 257 U. S. 47	10, 13, 16, 17, 18, 26, 28, 29
Maryland v. *West Virginia*, 217 U. S. 1	22
Maryland v. *West Virginia*, 217 U. S. 577	11, 12, 15, 22, 24, 25, 29
Mississippi & Missouri Railroad Co. v. *Ward*, 2 Black 485	9
Morgan v. *Meuth*, 60 Mich. 238	21
Morris v. *United States*, 174 U. S. 196	10, 11, 12, 16, 19
Northern Indiana Railroad Co. v. *Michigan Central Railroad Co.*, 15 How. 233	8
Plumpton v. *Converse*, 42 Vt. 712	21

Cases—Continued. Page

Salton Sea Cases, 172 Fed. 792, certiorari denied, 215 U. S. 603 8
Shively v. *Bowlby*, 152 U. S. 1 12
Smoot v. *District of Columbia*, 23 App. D. C. 266 27
Vineyard Land & Stock Co. v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 8
Wilder v. *Wheeldon*, 56 Vt. 344 20

United States Statutes:

Act of July 9, 1846, c. 35, 9 Stat. 35 21
Act of March 3, 1879, c. 196, 20 Stat. 481 ..... 16, 28

Miscellaneous:

Compact of 1785 between Maryland and Virginia 14, 32–38
1 Dorsey, Maryland Laws, 1692–1839, p. 187 ..... 14, 32
Hall, International Law (7th ed.) 125 12
Hanson, Laws of Maryland (1787) 13
1 Hening, Virginia Statutes, 57–66, 80–98, 98–110 9
12 Hening, Virginia Statutes, p. 50 ..... 14, 32
13 Hening, Virginia Statutes, p. 43 20
Maryland Laws, 1788, c. 46 20
Maryland Laws, 1791, c. 45 20
Maryland Laws, 1874, c. 247, pp. 363–364 23
1 Moore, International Law Digest, 617 12
Report of the Joint Commissioners to adjust the boundary line of the States of Maryland and Virginia, published in Annapolis in 1874 26
Resolutions assented to November session, 1795, in Maryland Laws, 1795 25
Resolution No. 99, in Maryland Laws, 1834 25
3 Thorpe, Charters and Constitutions, 1669–1677, 1677–1686 ..... 9, 31–32
7 Thorpe, Charters and Constitutions, 3783–3810 9
7 Thorpe, Charters and Constitutions, 3812, 1818 13
Virginia Laws, 1874, c. 135, pp. 151–152 23
Washburn, Easements and Servitudes (4th ed.) 683–685 20

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 18) is reported in 44 F. (2d) 343. The opinion of the District Court (R. 12) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 24, 1930. (R. 25.) The petition for certiorari was filed January 24, 1931, and was granted March 2, 1931. (R. 26.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the boundary line between the Commonwealth of Virginia and the District of Columbia is at high-water mark or low-water mark on the Virginia or south side of the Potomac River.

STATEMENT

This suit was instituted by a petition filed in the Circuit Court of Arlington County, Virginia, to enjoin alleged trespasses on property which the respondent claims to own between high and low water mark on the Virginia side of the Potomac River.

The petition alleged:

The respondent is the owner of certain lands in Virginia, including a parcel of land adjacent to the Potomac River, immediately opposite the City of Washington, in the District of Columbia, and extending to low-water mark thereof, and covered and uncovered by the ordinary flow and ebb of the tide. (R. 1–3.) This land, and other lands described in the bill, were purchased by respondent "for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes, and other aircraft could land and take off without obstruction," and for the purpose of the development of the real estate along the water front for commercial purposes, etc. (R. 3.) On or about the 19th day of September, 1929, the petitioner wrongfully, and without the

consent or knowledge of the plaintiff, entered upon said tideland, and, by means of a dredging boat, or other appliance, proceeded to make excavations thereon, and to fill certain portions thereof by dumping large quantities of gravel, rock, refuse, and other materials, and has so continued to do ever since the date mentioned. (R. 4.) It was alleged that the petitioner's activities would cut off respondent's access to the river and to wharfs, piers, and docks intended to be erected by it, as a result of which the value of the lands would be destroyed and the respondent would be caused to suffer great and irreparable injury, for which it had no adequate remedy at law. (R. 4–5.)

It was prayed that an injunction issue ordering the petitioner to remove its property, machinery, and appliances from the lands of the respondent; and that it, its agents, and servants, be restrained from again entering upon said property, and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the lands or premises of respondent. (R. 5.)

The petitioner immediately filed a motion to remove the cause to the District Court of the United States for the Eastern District of Virginia upon the ground of diversity of citizenship. In this motion it alleged "that in the prosecution of such work, petitioner is acting pursuant to the authority of the United States of America, contained in a cer-

tain written contract between the petitioner and the United States of America, dated September 20, 1929." (R. 9–10.) The cause was duly removed to the United States court. (R. 11.)

The petitioner then filed a motion to dismiss (R. 12), which was sustained by the District Court upon the ground that the property in question was not within the Commonwealth of Virginia, and that, therefore, the United States District Court for the Eastern District of Virginia had no jurisdiction of the action (R. 12–14.)

Thereafter the respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit. (R. 17.) On October 24, 1930, that court entered its decree reversing the District Court, and holding, in effect, that the property in question lying between high and low water mark on the south or Virginia side of the Potomac River was within the limits of the Commonwealth of Virginia, and within the jurisdiction of the United States District Court for the Eastern District of Virginia. (R. 25.)

Following the decision of the Circuit Court of Appeals, and upon the return of the record therein to the United States District Court pursuant to such decision and decree, the District Court on December 12, 1930, allowed the respondent to file a supplemental bill of complaint setting forth that the defendant had, under the work alleged in the original bill, made extensive excavations and fills upon the premises herein involved, and praying

that the petitioner be required to remove the excavations and fills and restore the *status quo*.

SPECIFICATION OF ERRORS

The court erred—

1. In holding that the boundary of the Commonwealth of Virginia extends to and embraces any part of the bed of the Potomac River below high-water mark on the Virginia shore opposite the City of Washington.

2. In holding that the District Court of the United States for the Eastern District of Virginia had jurisdiction of the subject matter of the cause.

3. In holding that by the Seventh Section of the Compact of March 28, 1785, entered into between Commissioners of Maryland and Virginia, the jurisdiction of the Commonwealth of Virginia and the rights of its citizens were settled as extending to low-water mark on the southern shore of the Potomac River.

4. In holding that the Compact of March 28, 1785, ever was or now is in force in the District of Columbia.

5. In holding that the District Court for the Eastern District of Virginia wrongfully dismissed the bill of complaint for lack of jurisdiction.

SUMMARY OF ARGUMENT

I

By the original grant of the Province of Maryland to Lord Baltimore the boundary between

Maryland and Virginia was fixed at high-water mark on the south shore of the Potomac River. The effect of the various conflicting grants of the territory comprising Virginia and Maryland was presented to this Court in *Morris* v. *United States,* 174 U. S. 196. This Court there said that the charter granted to Lord Baltimore by Charles I in 1632 "embraced the Potomac River * * * to high-water mark on the southern or Virginia shore." This conclusion was reaffirmed in *Maryland* v. *West Virginia,* 217 U. S. 577.

II

Neither the Virginia Constitution of 1776 nor the Compact of 1785 between Maryland and Virginia affected the location of the boundary line. The Compact of 1785 was a treaty between two sovereign States. It was essentially a regulation of commerce. At most it did no more than create easements or servitudes in the territory of Maryland in favor of the citizens of Virginia. The Compact did not settle the question of boundary. Indeed, the controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785.

This Court in *Marine Railway Co.* v. *United States,* 257 U. S. 47, expressly decided that the Compact of 1785 had no effect upon the boundary line between the two States.

In so far as the Compact of 1785 granted privileges or servitudes to the citizens of Virginia,

we submit that it was never in force in the District of Columbia, and that it does not affect the boundary between the District of Columbia and Virginia. It is a familiar doctrine of the common law that upon the uniting of the dominant and servient estates in the same owner, the servitude is extinguished. Nor was any servitude in favor of Virginia recreated when part of the District was retroceded to Virginia. When servitudes have been extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words.

III

The court below relied on the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577. There is language in this opinion which tends to support the conclusion of the court below. But we contend that the language thus used was not necessary to the decision of the case. We submit that the real basis of this Court's decision in *Maryland* v. *West Virginia* was prescription. That case established that the line at low-water mark was the boundary between West Virginia and Maryland because that was the line which the State of Maryland by long acquiescence had estopped herself to question.

But no claim based upon prescription was alleged in the instant case nor can any be asserted. From

1791 until 1846 all of the territory now in question, including both banks of the river and its entire bed, was in the District of Columbia, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. Furthermore, in its decision in *Marine Railway Co.* v. *United States*, 257 U. S. 47, this Court held that the Compact of 1785 did not affect the question of boundary. We submit that the decision in *Maryland* v. *West Virginia* does not support the conclusion reached by the court below.

ARGUMENT

The question presented in this case is whether the District Court for the Eastern District of Virginia has jurisdiction over land between low-water mark and high-water mark on the south shore of the Potomac River. There is some authority to the effect that a court of equity may compel action outside of its territorial jurisdiction. *The Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9th), certiorari denied, 215 U. S. 603; *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 (C. C. A. 9th). But no such contention is made here by the respondents, and the decisions of this Court establish the rule that, in the absence of unusual circumstances at least, an equity court may not enjoin or compel action outside of the territory over which it has jurisdiction. *Northern Indiana Railroad Co.* v. *Michigan Central Railroad Co.*, 15

How. 233; *Mississippi & Missouri Railroad Co.* v. *Ward*, 2 Black 485.

The determination of the location of the boundary line here involved depends upon a consideration of various grants and statutes, together with certain decisions of this Court which have considered closely related problems.

I

BY THE ORIGINAL GRANT TO LORD BALTIMORE THE BOUNDARY BETWEEN MARYLAND AND VIRGINIA WAS FIXED AT HIGHWATER MARK ON THE SOUTH SHORE OF THE POTOMAC RIVER

In 1606 King James I granted the first charter of Virginia. This was soon followed by two other charters, the second charter granted in 1609 and the third charter granted in 1611/12.[1] These charters gave Virginia a tract of land extending two hundred miles north from Point Comfort, thus including all of the Potomac River and considerable territory north of the river.

On June 20, 1632, Charles I granted to Cecilius Calvert, Second Baron of Baltimore and First Lord Proprietary of the Province of Maryland, all the territory of that Province.[2] By the terms of

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[1] These charters are printed in 7 Thorpe, Charters and Constitutions, 3783–3810, and in 1 Hening, Virginia Statutes, 57–66, 80–98, 98–110.

[2] The text of this charter may be found in 3 Thorpe, Charters and Constitutions, 1669–1677. A translation of the charter is printed *ibid*, 1677–1686. A translation of the paragraph of the charter which is involved in the present case is set forth in the Appendix, *infra*, pp. 31–32.

that charter it was provided that the western boundary of the grant should run south from what is now Pennsylvania toward the Potomac River "unto the further Bank of said River and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of said River * * *."[3]

On September 27, 1688, King James II granted to Lord Culpeper the territory known as the Northern Neck of Virginia. This grant by its terms included all of the Potomac River.[4]

The controversy arising out of the conflicting provisions of these grants was first presented to this Court in *Morris* v. *United States*, 174 U. S. 196. There the heirs of John and James Marshall, claiming under the grant made in 1688 to Lord Culpeper, sought to establish their ownership of the entire bed of the Potomac River as against the United States which claimed to own the land in question as the successor of Maryland under the grant to Lord Baltimore made in 1632. This Court con-

[3] The original passage of which this quotation is a translation read as follows: "ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ed Meridionalem spectat usque ad Locum quendam appellatum *Cinquack* prope ejusdem Fluminis Ostium scituatum * * *."

[4] The contention that the boundary line in question was in any way affected by a grant made by the Governor of Virginia to one Howsing in 1669 was disposed of by this Court in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 63.

sidered the effect of the two grants, and said (p. 225):

> * * * we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore by Charles I, in 1632, of the territory known as the Province of Maryland, embraced the Potomac River and the soil under it, and the islands therein, *to high-water mark on the southern or Virginia shore*; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper. (Italics ours.)

The conclusion that the charter granted to Lord Baltimore carried the boundary of Maryland to high-water mark on the south bank of the Potomac was reaffirmed by this Court in *Maryland* v. *West Virginia*, 217 U. S. 577. There this Court, after referring to an arbitration before Commissioners appointed by Virginia and Maryland in 1877, said (p. 579):

> They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris case*, in which case it was declared

> that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, * * *.

Whether the statement in *Morris* v. *United States, supra,* that the grant of Charles I embraced the Potomac River to its high-water mark on the Virginia shore was necessary to the decision of that case or not, there can be no question as to its correctness. The shore of a river to the line of ordinary high-water mark is part of the river. The grant of a river to a State carries the boundary to the normal high-water mark. *Alabama* v. *Georgia,* 23 Howard 505. This is especially true of a tidal river. A shore, overflowed at high tide, is not susceptible of use except as incident to the use of the stream. The title is held subject to the same public uses as the water itself. *Shively* v. *Bowlby,* 152 U. S. 1.

On the other hand, [illegible]y at low-water mark is inconsistent with [illegible]itle and dominion over the river which was g[illegible]o Maryland. It is because of this inconsistency that international law has recognized the principle that where the ownership of a river is not divided between bordering States by the thread of the stream, but belongs to one of them alone, the ownership extends to the opposite bank as accessory to the use of the stream. Hall, International Law (7th ed.) 125; 1 Moore, International Law Digest, 617.

II

NEITHER THE VIRGINIA CONSTITUTION OF 1776 NOR THE COMPACT OF 1785 BETWEEN MARYLAND AND VIRGINIA AFFECTED THE LOCATION OF THE BOUNDARY LINE

On June 29, 1776, the Commonwealth of Virginia, through a convention, adopted a constitution in which the territory granted by the Charter of Maryland was confirmed, but with the reservation of "the property of the Virginia shores and strands, bordering" on the Potomac River.[5] Similar provisions have been made in the statutes of Virginia. Regardless of the interpretation which should be given to this clause, it is clear that Virginia could not extend her boundaries by any statements made in her constitution or statutes.[6] Even though Maryland had taken no notice of this constitutional provision or of acts of the Virginia Assembly, her silence could not be deemed an acquiescence in the claims they implied. But Maryland did not remain silent, for as soon as Virginia, by her constitution of 1776, made an open, public declaration of claims to the Potomac River, Maryland at once solemnly repudiated them. See Proceedings of Convention for October 29, 30, 1776, in Hanson, Laws of Maryland (1787).

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[5] The text of this constitution may be found in 7 Thorpe, Charters and Constitutions, 3812, 3818.

[6] As this Court said in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 65: "Maryland and the United States are not called upon to scrutinize the discourse of those in Virginia even if in statutory form."

In 1785 the States of Maryland and Virginia entered into a compact in order to determine certain questions which had been in dispute between them.[1] Article 6 of this Compact provided that the river Potomac should be considered as a common highway of navigation and commerce to the citizens of Virginia and Maryland and of the United States. Article 7 provided that—

> The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; * * *.

The court below held (R. 20) that this Compact—

> unquestionably did settle the jurisdiction of that State [Virginia] and the rights of its citizens as extending to low-water mark on the river.

Relying on the effect which it thus gave to the Compact of 1785, the court below concluded that the boundary line between the District of Columbia and Virginia is located, as a result of the Compact, at low-water mark on the south shore of the Poto-

[1] The text of the Compact may be found in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50. For convenience it is set out in the Appendix, *infra*, pp. 32–38.

mac River.[8] We submit that the court erred in this conclusion.

The Compact of 1785 was a treaty between two sovereign States, dealing with the use of the river upon principles of public law. So long as it remained in force, it merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia and her citizens amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines.

The dominant idea of the Compact was centered upon commerce and navigation, and the privileges accorded in the waters and adjacent shore, it may reasonably be assumed, were but a further means of carrying out that idea. The effect was to permit the use of the shores for the loading and unloading of goods and the building of wharves and such other structures as are related to commerce and navigation. The grant of a servitude in the

[8] The court below, in reaching its conclusion that the Compact of 1785 settled the boundary line, also relied on certain language used by this Court in its opinion in *Maryland* v. *West Virginia*, 217 U. S. 577, 580. The effect of this language is considered in point III of this brief, *infra*, pp. 22–29.

waters and adjacent shore did not in any respect modify the boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore. Commerce was the dominating idea of the Compact. Benefits resulting to individuals were incidental and secondary. The Compact was made by the States in their sovereign capacities. Obviously the term "full property in the shores" as used in the Compact was but a grant of the privilege of the use of the shore so long as the Compact remained in force. It meant nothing more and could have had no effect upon the boundary fixed by the charter.

Indeed, the controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785. *Morris* v. *United States*, 174 U. S. 196, 224; *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64. Finally, in 1874 the legislatures of the two States agreed in the selection of arbitrators to settle the dispute. These arbitrators made their award in 1877, fixing the boundary between Virginia and Maryland at low-water mark.[1] In this connection it is signifi-

[1] The opinion of the arbitrators was transmitted by the Governor of Virginia to the legislature of that State on January 19, 1877, and printed as House Document No. VI (Library of Congress No. F187/B7B65). An edition of the opinion and award was also published in Washington (Library of Congress No. F187/B7B66).

The consent of Congress to this award was given by the Act of March 3, 1879, c. 196, 20 Stat. 481. Of course the award itself did not affect the boundary between the District

cant that until the award of the arbitrators Virginia claimed not only the land to low-water mark, but the entire river, or later, half the river.[10] Thus the two contracting States themselves did not regard the Compact of 1785 as having determined the location of their common boundary. It is a fact of the highest probative value in settling this point that the two States submitted the question of boundary to arbitration. If the question of boundary was left open and undetermined and was not settled until the report of the arbitrators was accepted by the States in 1878, the court below was clearly in error when it concluded that the Compact settled

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of Columbia and Virginia. *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64; *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.). It is contended in point III of this brief (*infra*, pp. 22–29) that the award of the arbitrators in favor of Virginia was based primarily upon prescription, a factor which is not present in the case now under consideration.

[10] The opinion of the arbitrators contains the following paragraph (appearing on p. 6 of the Washington edition of the opinion and award referred to in footnote 9, *supra*):

"The State of Virginia, through her commissioners and other public authorities, adhered for many years to her claim for a boundary on the left [north] bank of the Potomac. But the gentlemen who represent her before us expressed with great candor their own opinion that a true interpretation of the King's concession would divide the river between the States by a line running in the middle of it. This latter view they urged upon us with all proper earnestness, and it was opposed with equal zeal by the counsel for Maryland, who contended that the whole river was within the limits of the grant to Lord Baltimore."

the jurisdiction of the State of Virginia "and the rights of its citizens as extending to low-water mark."

Furthermore, this Court has expressly decided that the Compact of 1785 had no effect upon the boundary line between the two States. In *Marine Railway Co.* v. *United States*, 257 U. S. 47, *supra*, this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in Article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right of fishing, it left the question of boundary open to long continued disputes.

The court below in its opinion (R. 25) attempted to distinguish the language of this Court set forth above on the ground that the *Marine Railway case* involved the question whether the boundary should be drawn from headland to headland and that consequently the language used could not

refer to the question whether the boundary should be established at high-water mark or low-water mark. But we do not believe that this Court's language in the *Marine Railway case* can be so limited. It was an essential part of the decision in that case that the Compact of 1785 need not be considered in determining the boundary of the District of Columbia, and that conclusion is equally applicable in the instant case. See also *Morris v. United States,* 174 U. S. 196, 224.

In any event, the purpose of the Compact was pointed out. It was a regulation of commerce. Obviously the reason why the Compact had "no bearing upon the case" was that it did not settle the boundary. This is clearly indicated by the fact that the Compact said "nothing about the boundary in terms" and "left the question of boundary open to long continued disputes."

The Compact, not having changed the boundary, whatever rights below high water it may have granted were extinguished in the District of Columbia when the parties to the Compact ceded to the United States the territory originally included in the District of Columbia. By the acts of cession from Maryland and Virginia to the United States, both States surrendered to the United States all their rights of property, as well as their entire sovereignty within the territory ceded, including the whole of the river, its bed,

and its shores.[11] The Compact was made by the States in their sovereign capacities subject at any time to be modified or abrogated by their joint will. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The Compact necessarily came to an end, so far as the District of Columbia was concerned, when the titles of the two contracting parties were united in one. It is a familiar doctrine of the common law that immediately upon the uniting of dominant and servient estates in the same owner, the servitude is extinguished. Washburn, Easements and Servitudes (4th ed.) 683–685; *Atwater* v. *Bodfish*, 11 Gray (Mass.) 150; *Coleman's Appeal*, 62 Pa. 252, 274; *Wilder* v. *Wheeldon*, 56 Vt. 344. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App. D. C. 544, 550. To the same effect is *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia in 1846 operated to revive the Compact of 1785 or to reestablish the privileges and servitudes granted by the Compact. Whatever easements and privileges Virginia

[11] The cession to the United States was authorized by the Maryland Act of December 23, 1788 (Maryland Laws, 1788, c. 46), and by the Virginia Act of December 3, 1789 (13 Hening, Virginia Statutes, 43). The Maryland cession was confirmed by the Maryland Act of December 19, 1791. (Maryland Laws, 1791, c. 45.)

possessed under the Compact were destroyed by the joint cession to the United States. The act of retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact [12] and the merged easements and privileges were in no way revived. It is well recognized as a principle of common law that when servitudes are extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words. *Morgan* v. *Meuth*, 60 Mich. 238; *Fetters* v. *Humphreys*, 19 N. J. Eq. 471; *Plimpton* v. *Converse*, 42 Vt. 712. In *Evans* v. *United States*, 31 App. D. C. 544, *supra*, the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

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[12] The terms of this statute, so far as they relate to the retrocession of the territory, were that "* * * all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon."

III

THE DECISION OF THIS COURT IN MARYLAND v. WEST VIRGINIA, 217 U. S. 577, DOES NOT SUPPORT THE DECISION OF THE COURT BELOW

The court below relied on the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577, to support the conclusion that the Compact of 1785 created a new interstate boundary line. In an earlier decision in that case (*Maryland* v. *West Virginia*, 217 U. S. 1) this Court had determined the land boundary between the two States at the western part of Maryland. It had also dismissed the cross bill of the State of West Virginia, in so far as it asked for a decree fixing the north bank of the Potomac River as her boundary. When the parties came to submit a decree to this Court in accordance with its decision, a dispute arose as to whether the boundary between the two States along the south bank of the river was at low-water mark or at high-water mark.

In its opinion this Court quoted from the award made in 1877 by the arbitrators agreed upon by Maryland and Virginia.[18] In the language thus

[18] In this quotation, appearing at 217 U. S. 579–580, there is a line of stars, indicating the omission of a sentence. We think that the sentence omitted is material, for it shows clearly that the decision of the arbitrators was based on prescription and not on the construction of the compact. The omitted sentence reads, as follows (quoting from p. 16 of the Washington edition of the opinion and award, referred to in note 9, *supra*): "We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we can not help being influenced

quoted, the arbitrators apparently adopted the view that the Compact of 1785 taken together with the consistent claims of Virginia operated to fix the boundary between Virginia and Maryland at low-water mark. This Court then said (pp. 580–581):

> We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the Compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

The language thus used, we agree, tends to support the conclusion of the court below. But we contend that the language thus used was not necessary to the decision of the Court, and that it was not in

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by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below."

The power of the arbitrators as to the Compact of 1785 was expressly limited by the statutes agreeing to the arbitration. Virginia act of March 28, 1874, Va. Laws, 1874, c. 135, pp. 151–152; Maryland act of April 11, 1874, Md. Laws, 1874, c. 247, pp. 363–364.

fact the basis of the decision in that case. We have already argued in point II of this brief (*supra*, pp. 13–21) that the Compact of 1785 did not affect the boundary line.

We submit that the real basis of this Court's decision in *Maryland* v. *West Virginia*, 217 U. S. 577, *supra*, was prescription. In its opinion in that case, this Court referred to the arbitration of 1877 between Maryland and Virginia, and stated that although the arbitrators reached the conclusion that the boundary of Maryland, as described in the Charter of Charles I, was at high-water mark on the south shore,[14] they proceeded (p. 579)—

> to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises the right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, * * *.

The Court then held that the considerations which had influenced the arbitrators to adopt low-water mark as the boundary between Maryland and Virginia applied with equal force to the line between Maryland and West Virginia. It is thus made clear that the decision in *Maryland* v. *West Virginia*, *supra*, turned upon the question of prescrip-

[14] This part of the Court's opinion is quoted at pp. 11–12, *supra*.

tion. The line at low-water mark was the line which the State of Maryland by long acquiescence had estopped herself to question.

In considering the decision in *Maryland* v. *West Virginia,* it is important to keep in mind the basis of the arbitrators' award, and the exact issues which were there decided. Prior to the submission of the location of the boundary to arbitration in 1874, the matter had been in dispute for many years.[15] Numerous efforts had been made to settle the question. Finally, in 1870, the States of Maryland and Virginia had appointed Commissioners for the purpose of adjusting the boundary line along the Potomac River and across Chesapeake Bay and the eastern shore. These Commissioners were unable to agree, but they filed reports in which they stated their respective cases and recommended to the legislatures of their States that the dispute be referred to arbitrators. It thus appears that the negotiations of the Commissioners were the imme-

[15] Within ten years after the Compact of 1785 the legislature of Maryland, by resolution, appointed Commissioners "to settle and adjust, by mutual compact between the two governments, the western and southern limits of this state." Resolutions assented to November Session, 1795, in Maryland Laws, 1795. On March 21, 1835, the legislature of Maryland adopted a resolution seeking to have the boundary dispute settled. In the report accompanying this resolution it was stated: "The southern and western boundaries of Maryland have never been adjusted and defined, by compact with Virginia." Resolution No. 99, in Maryland Laws, 1834. Numerous other efforts to adjust the boundary were made by both States.

diate forerunner of the arbitration and that the issues which the Commissioners were unable to settle were the issues which were left to arbitration.

The reports of the Commissioners of Maryland and Virginia were published in 1874 prior to the arbitration. An examination of these reports makes it plain that the only issue with respect to the Potomac River was raised by Virginia's claim of jurisdiction at first over the entire river, and, later, over half the river.[16] Maryland conceded the line at low-water mark on the south shore, so that the issue of low-water mark *vel non* was not really before the arbitrators.

Furthermore, the opinion of the arbitrators makes it apparent that the dominating factor in their decision as to the whole boundary line then in dispute was prescription. In fact, the arbitrators regarded adverse occupation of only twenty years as sufficient to change the interstate boundary.[17]

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[16] See the Report of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia, published in Annapolis, in 1874 (Library of Congress No. F187/B7C736), at pp. 1, 6, 19, 53, 54, 56, 60, 140, and Final Report of the Virginia Commissioners on the Maryland and Virginia Boundary, published in Richmond, in 1874 (Library of Congress No. F187/B7V74), at pp. 9–11, 13, 22–25. Extracts from the reports of the Commissioners appear at pp. 80–81, 108 of the record filed in *Marine Railway Co.* v. *United States*, No. 45, October Term, 1921. See also the statement in the opinion of the arbitrators quoted in note 10, on p. 17, *supra*.

[17] Thus the arbitrators stated as a basis of their decision (quoted from p. 27 of the Washington edition of the opinion

But no claim based upon prescription was alleged in the instant case, nor can any be asserted. From 1791 until 1846 all of the territory now in question was in the District of Columbia. No prescriptive right in favor of Virginia could arise during that period, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. In *Alexandria Canal, Railroad & Bridge Co.* v. *District of Columbia,* 1 Mackey 217, decided in 1881, it was held that the District of Columbia might tax property located between high-water mark and low-water mark on the south shore of the river. In *Smoot* v. *District of Columbia,* 23 App. D. C. 266, decided in 1904, it was held that the District of Columbia might require a license for a dredge operating in the Potomac opposite Georgetown between high and low water mark. In *Evans* v. *United States,* 31 App. D. C. 534, decided in 1908, the defendant was held properly convicted of fishing within the District of Columbia when he stood on land in Virginia and dipped a net into the water between the high-water mark and the low-water mark in the Potomac. A similar result was reached in *Herald* v. *United*

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and award referred to in note 9, *supra*): "Wherever one State has gone over the Charter line taking territory which originally belonged to the other and kept it, without let or hindrance, for more than twenty years, the boundary must now be run so as to include such territory within the State that has it."

States, 284 Fed. 927 (Ct. of App. D. C.), decided in 1922.[18]

In its opinion in *Marine Railway Co.* v. *United States*, 257 U. S. 47, this Court pointed out that the jurisdiction of the District apparently has been "exercised without dispute." This Court said (pp. 65–66)—

> the Revised Statutes relating to the District of Columbia, June 22, 1874, § 1, describe the District as " including the river Potomac in its course through the District," which imports an assertion by Congress that the title of the United States embraces the whole river bed; and the jurisdiction of the District over the river seems to have been exercised without dispute. For cases that have reached the reports see *Alexandria Canal Railroad & Bridge Co.* v. *District of Columbia*, 1 Mackey, 217, 225, 226. *Smoot* v. *District of Columbia*, 23 App. D. C. 266. *Evans* v. *United States*, 31 App. D. C. 544.

See also the Act of March 3, 1879, c. 196, 20 Stat. 481, 483, by which the United States, in giving its consent to the award between Virginia and Maryland, provided that nothing contained in the award—

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[18] Numerous other instances of arrests by officers of the District of Columbia for fishing above low-water mark in the Potomac River, and for other offenses, are referred to at pp. 86–88 of the Record filed in *Marine Railway Co.* v. *United States*, No. 45, October Term, 1921. These arrests took place between 1901 and 1915.

> shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the highways and waters which form the subject of the said agreement or award."

We submit that the decision of this Court in *Maryland* v. *West Virginia, supra,* was based upon the award of the arbitrators made in 1877, and upon the effect given to prescription in that award. See *Herald* v. *United States,* 284 Fed. 927, 928 (Ct. of App. D. C.). The prescription relied on in that case is not present in the instant case, and we consequently contend that the actual decision in *Maryland* v. *West Virginia* is not applicable here. Futhermore, we submit that the language used by this Court in its opinion in that case regarding the effect of the Compact of 1785 was not necessary to the decision of that case and should not be followed in the instant case. That this is the proper interpretation of this Court's decision in *Maryland* v. *West Virginia* is, we submit, further indicated by the decision in *Marine Railway Co.* v. *United States,* 257 U. S. 47, where this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

The petitioner in this case is a private corporation, but the question at issue is one in which the United States is vitally concerned. It is a matter of common knowledge that the Government has now in progress and in prospect extensive projects for the utilization and beautification of the land between low and high water mark similar in character and location to the lands involved in this suit. For this reason the contention that these lands do not lie within the District of Columbia and the exclusive jurisdiction of the United States presents a question of controlling interest to the Government in connection with the development of these projects. For these reasons the petitioner, whose activities here questioned were carried on pursuant to a contract with the United States, has been represented in the courts below, and is here represented, by counsel who are attorneys for the United States.

Respectfully submitted.

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MARCH, 1931.

APPENDIX

CHARTER OF MARYLAND

The charter granted by King Charles I to Lord Baltimore,[1] dated June 20, 1632, provided in part as follows:

> III. Know Ye therefore, that We, encouraging with our Royal Favour, the pious and noble purpose of the aforesaid Barons of Baltimore, of our special Grace, certain knowledge, and mere Motion, have Given, Granted and confirmed, and by this our present Charter, for Us our Heirs, and Successors, do Give, Grant and Confirm, unto the aforesaid Caecilius, now Baron of Baltimore, his Heirs, and Assigns, all that Part of the Peninsula, or Chersonese, lying in the Parts of America, between the Ocean on the East and the Bay of Chesapeake on the West, divided from the Residue thereof by a Right Line drawn from the Promontory, or Head-Land, called Watkin's Point, situate upon the Bay aforesaid, near the river Wigloo, on the West, unto the main Ocean on the East; and between that Boundary on the South, unto that Part of the Bay of Delaware on the North, which lieth under the Fortieth Degree of North Latitude from the Equinoctial, where New England is terminated; And all that Tract of Land within the Metes underwritten (that is to say) passing from the said

[1] The original charter was in Latin. Its text is given in 3 Thorpe, Charters and Constitutions, 1669–1677. The translation above is found in *ibid.* 1677, 1678.

Bay, called Delaware Bay, in a right Line, by the Degree aforesaid, unto the true meridian of the first Fountain of the River of Pattowmack, thence verging toward the South, unto the further Bank of the said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of the said River, where it disembogues into the aforesaid Bay of Chesapeake, and thence by the shortest Line unto the aforesaid Promontory or Place, called Watkin's Point; so that the whole tract of land, divided by the Line aforesaid, between the main Ocean and Watkin's Point, unto the Promontory called Cape Charles, and every the Appendages thereof, may entirely remain excepted for ever to Us, our Heirs and Successors.

THE COMPACT OF 1785

The compact entered into in 1785 between Maryland and Virginia[2] was as follows:

First. The commonwealth of Virginia disclaims all right to impose any toll, duty, or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of

[2] The text of the compact is given in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

its citizens, or carrying on any commerce to or from the said state, or with any of its citizens; and that every such vessel inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also, that the before mentioned parts of Chesapeake bay, and Pocomoke river, be free for the navigation of vessels from one part of the state of Maryland to another.

Second. The state of Maryland agrees that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty, or other charge.

Third. Vessels of war, the property of either state, shall not be subject to the payment of any port duty or other charge.

Fourth. Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval-officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges.

Fifth. All merchant vessels (except such as are described in the fourth article) navigating the river Potowmack, shall enter and clear at some naval office on the said river, in one or both states, according to the laws of the state in which the entry shall be made.

And where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state only in proportion to the commodities carried to, or taken from, such state.

Sixth. The river Potomack shall be considered as a common highway, for the purpose of navigation and commerce to the citizens of Virginia, and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.

Seventh. The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states: *Provided,* That such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

Eighth. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

Ninth. Lighthouses, beacons, buoys, or other necessary signals, shall be erected, fixed and maintained upon Chesapeake bay, between the sea and the mouths of the rivers Potowmack and Pocomoke, and upon the river Potowmack, at the expense of both states. If upon Potowmack river, at the joint and equal charge of both states; and if upon the before mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts of such expense; and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode, and plans for erecting and fixing lighthouses, buoys, beacons and other signals, as aforesaid, both states shall upon the application of either to the other, appoint an equal number of commissioners, not less than three nor more than five from each state, to meet at such times and places as the said commissioners or a major part of them, shall judge fit, to fix upon the proper places, mode, and plans for erecting and fixing such lighthouses, beacons, or other signals, and report the same, with an estimate of the expense, to the legislatures of both states, for their approbation.

Tenth. All piracies, crimes, or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two states upon the said river, is doubtful, by any persons not citizens of the com-

monwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offence. And all piracies, crimes, and offences committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences: And all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke River, by any citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack, shall be exercised in the same manner as is prescribed for the before mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer,

any court of record, or civil magistrate of the state where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner, as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offence shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court; or magistrate, of the state where such offender may reside, having jurisdiction within the state, or county where the offender may reside, in cases of a similar nature, such court, or magistrate, shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court, or magistrate, to which such transcript shall be exhibited.

Eleventh. Any vessel entering into any port on the river Potowmack, may be libelled, or attached for debt, by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized, by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice, in a civil or criminal case, or shall at-

tempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers, upon any person or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court, or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside.

Twelfth. The citizens of either state having lands in the other, shall have full liberty to transport to their own state, the produce of such lands, or to remove their effects, free from any duty, tax, or charge whatsoever, for the liberty to remove such produce or effects.

Thirteenth. These articles shall be laid before the legislatures of Virginia and Maryland and, their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed, or altered, by either, without the consent of the other.

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